Maryland Watershed Implementation Plan
Comments by the City of Rockville, Maryland

RE: Draft Phase I Maryland Watershed Implementation Plan Comments

Contact: Jake Marren
Email: Jmarren@Rockvillemd.gov
Environmental Management
Telephone: 240-314-8876

1. **Maryland should reallocate load reductions between point sources and nonpoint sources and develop a regulatory framework to ensure that nonpoint sources meet their reduction requirements.**

The Draft Phase I Watershed Implementation Plan (WIP) does not adequately address how the proposed pollution reduction strategies are justified or cost effective. To justify the allocations of load reductions, the WIP must demonstrate that load reductions are commensurate with that source's environmental impact, will be imposed on sources with the capacity to achieve the reductions, and that the reductions are cost effective. Three facts found in the WIP indicate that the current slate of options considered do no meet this standard: (1) agriculture, unregulated urban stormwater, and other nonpoint sources comprise a significantly larger portion of the current pollutant load than urban stormwater[1], (2) costly urban stormwater retrofits will be imposed on NPDES jurisdictions with insufficient amounts of state funding offered to help pay for these improvements and no consideration of whether these costs will be justified, and (3) the nonpoint source sector will be expected to achieve modest pollution reductions primarily through a series of state or federally-funded voluntary programs.

Section 319 of the Federal Clean Water Act directs the states to create and implement nonpoint source pollution programs to ensure that all navigable waters meet water quality standards. The statute also states that these programs should contain a regulatory and enforcement component. It is inequitable to force NPDES permit holders to achieve stringent reductions through expensive retrofits under threat of penalty while the nonpoint sector is only enticed with carrots funded by government. To be effective and fair, Maryland's nonpoint pollution control program must include a credible regulatory and enforcement component. The Water Quality Improvement Act, requiring nutrient management plans, was a good start. Maryland should leverage nutrient management plans to achieve more stringent reductions from agriculture. Plans should be monitored and enforced with the same stringency as MSA permits and the results quantified. If the

[1] *See* e.g. Maryland Watershed Implementation Plan 5-33, Figure 5.1. (showing that urban stormwater represents only 14% of nitrogen loads and the sum of all sources attributable to agricultural activity causes nearly 40% of loads).

management plans do not achieve the pollutant reductions necessary, the Department of Agriculture should make them more stringent. These are the cornerstones of a robust adaptive management strategy.

Finally, it is worth noting here that the Chesapeake Bay TMDL contemplates the states' nonpoint source programs stepping up to take pressure off of the NPDES permit holder community. Since the federal government lacks authority to regulate nonpoint sources but the states have ample authority to do so, EPA held out stringent "backstop" measures on point sources as an inducement for states to beef up their nonpoint source programs. Instead, the draft WIP does not meet this challenge and threatens to impose a heavy burden on local stormwater programs and wastewater treatment plants. Rockville disagrees with this strategy and urges Maryland to reexamine its implementation priorities.

2. Maryland must reform State law to support local stormwater utility fees and provide technical expertise to local stormwater programs to help quickly develop and implement local funding sources.

As one of a minority of local jurisdictions implementing a stormwater utility fee in Maryland, Rockville can attest to the amount of effort, time, and planning required to create and manage local funding sources. Chapter Five of the WIP cites stormwater utility fees as a key source of funding for implementing the TMDL and Rockville agrees. Utility fees, in addition to increased State and Federal funding, will be an important component of these funds. Unfortunately, Maryland is unprepared to implement local stormwater fees statewide in time to meet 2017 interim goals. Legal uncertainty regarding the limits of authority, local political opposition, and technical impediments will prohibit most MS4 communities from adopting stormwater utilities in the near term. Therefore, if Maryland is to rely on local funding to restore the Chesapeake Bay, the State will need to act aggressively in reforming state law to require local utilities. In addition, we urge the State to provide technical assistance and funding to local programs to lower the technical barriers preventing the swift adoption of utility fees or other funding mechanisms.

The first major impediment to creating local stormwater utility fees is the lack of clear legal authority under State law. The current law authorizing a "system of charges" is vague, disputed, and provides inadequate authority for local programs to fund the requirements of the WIP. For example, the Maryland Department of Environment's Model Stormwater Utility Ordinance (2003) states that government owned properties may be assessed the stormwater utility fee. This guidance is contradicted by an opinion of the Maryland Office of Attorney General, which implies that stormwater fees cannot be assessed on government property.[2] The lack of legal certainty concerning stormwater utilities as a fee for service prevents many communities from adopting or fully implementing utility fees

[2] 91 Op. Att'y Gen. 152, 155 n.3 (2006).

Secondly, many local jurisdictions lack the capacity and political will to implement stormwater utilities in time to meet the 2017 interim goals. If local jurisdictions wait until an acute funding need exists to investigate stormwater utilities, the long period of time required to design, adopt, and implement a program will likely mean that the 2017 interim goals will not be met. Similarly, many smaller stormwater programs lack the capacity to gather and manage the data necessary to create a utility. The Maryland Department of Environment should act quickly to minimize this lag time by helping with the costly and difficult tasks of gathering impervious surface data and selecting a rate structure.

In summary, Rockville urges the Maryland to enact legislation that requires local jurisdictions to adopt stormwater utility fees and that clarifies the responsibility of government to pay for the stormwater pollution it generates. Without such legislation, many local jurisdictions will not implement stormwater utilities until it is too late to meet the interim deadlines proposed in the WIP.

3. **Maryland should decrease the amount of stormwater retrofits required by 2017 to allow MS4 jurisdictions adequate time to conduct analyses of their potential retrofit opportunities and time to design and budget these projects.**

Even where local stormwater programs have adequate funding sources to construct stormwater retrofits, these programs must have sufficient time to assess their retrofit opportunities and to plan projects. For example, the Little Pimmit Run Watershed Retrofit Plan in Arlington County, which assessed the retrofit opportunities in Arlington, Virginia, took nearly two years to complete. Most jurisdictions will need to complete a similar planning effort before retrofit work can begin. Retrofits without proper planning will be expensive and ineffective. Local programs should be given time to find the most cost effective and practical ways to reduce pollution loads.

Once programs identify retrofit opportunities, they need time to schedule the projects into their capital improvement budgets and to complete project design. Based on our experience, this process can take up to two years to complete. This would mean that the first retrofit projects might not begin until the fifth permit year. Furthermore, many local programs lack the capacity to manage the number of projects that would be required to achieve the interim goal of 20%. Based on these planning, process, and logistical constraints, local programs will likely fail to meet the 2017 interim goals as written.

The permitting process for building retrofits is another barrier to the rapid implementation of retrofit requirements. Maryland must streamline the waterway and wetland joint permitting process, in conjunction with the Army Corps of Engineers, since these permit approvals often take six to nine months from submittal of engineering plans.

4. **Maryland should direct funding and technical assistance to NDPDES MS4 permit holders to support data gathering and asset management.**

To help address the comment above, the Maryland Department of Environment can decrease the time lag between when NPDES jurisdictions receive their permits and the construction of retrofits by helping local programs assess their retrofit opportunities quickly and accurately. This assistance should include funding to hire contractors to prepare assessments, or for larger jurisdictions with more capacity, technical guidance on how to assess retrofit opportunities. In addition, MDE should also provide assistance to local programs so they may measure the performance of completed watershed improvements, which will help better guide the design and locations of future retrofits.

5. **Maryland should provide flexibility for urban and suburban stormwater programs to demonstrate pollution load reductions with other methods where stormwater retrofits are impractical.**

Until MS4 jurisdictions can assess their retrofit opportunities, it is impossible to give reasonable assurance that pollutant reductions are feasible. The Maryland Department of Environment should allow local programs flexibility to use other pollution reducing technologies in lieu of stormwater retrofits where assessments show that retrofits cannot provide the necessary load reductions, or where more effective cost efficient opportunities exist. For example, many dense urban communities have limited space to install stormwater retrofits without incurring disproportionately high costs. Future NPDES permits should give credit towards the retrofit requirement for other activities such as stream restoration, street sweeping, and tree canopy improvement.

6. **The WIP should clearly define how the amount of required stormwater retrofits will be calculated and provide flexibility for local programs to achieve maximum benefit from their retrofits.**

Part of the stormwater retrofit planning process will require MS4 jurisdictions to assess their area of "pre-1985" impervious surface and then plan appropriate projects to achieve the required percent treated. Future WIPs must clearly spell out how these areas are calculated and how the area treated is quantified to avoid confusion and inadequate implementation. For example, there are numerous areas in Rockville that were developed pre-1985 with some form of stormwater management prior installed while there are post 1985 properties that have less management due to site constraints. The definition should address what retrofits will count towards meeting a retrofit requirement.

Such a definition is especially important considering the long range planning that will need to successfully complete all required retrofits. The sooner that program managers can enter their budget process with "concrete" requirements, the sooner funding will be made available to start retrofit projects.

7. **Maryland should not prohibit urban communities from using fee-in-lieu for forest conservation.**

On page ES-16, the WIP discusses potential amendments to the Forest Conservation Act that would prohibit local programs from collecting fee-in-lieu payments for projects not able to meet forest conservation requirements on site. Rockville supports the concept of no net loss of forest at a statewide level. In fact, our local tree reservation program is a model for other communities and has resulted in a 44% city-wide tree canopy. However, a prohibition of fee-in-lieu payments would have serious unintended consequences for our community. Rockville lacks the available private land to create forest mitigation banks, meaning that developers would have to secure forestry easements outside of the City limits, essentially "exporting" and likely reducing Rockville's valuable urban tree canopy. The City removed the option to meet forest conservation off-site several years ago when there no longer was adequate forest planting space on City parkland. In addition, the City has not allowed developers to use existing forest on City parkland to meet their on-site forest conservation requirements since the City deems these forests as already preserved. Through the collection of fee in lieu, the City is able to plant between 400 and 600 street trees per year while maintaining and protecting our existing forest canopy. Removing this source of funding would jeopardize Rockville's street tree and forest maintenance programs.

Rockville's Forest and Tree Preservation Ordinance boasts some of the most stringent reforestation and afforestation standards in the state.[3] Where these standards cannot be met on site, the City uses fees-in-lieu to plant and maintain trees within Rockville. Rockville lacks adequate space to create forest mitigation banks within its limits. Therefore, a strict application of a no net loss forest policy could actually decrease the number of trees in Rockville, thereby increasing the amount of urban stormwater discharged into the Potomac River and Chesapeake Bay. Maryland should continue to allow urban communities the flexibility to collect fee-in-lieu so they may implement successful local forest conservation strategies in the urban context and as a strategy to reduce urban stormwater runoff.

[3] http://www.rockvillemd.gov/government/citycode/ordinance12-07.pdf